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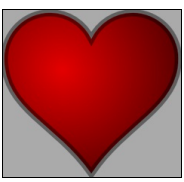
I Love An Appeal



There's so much that I enjoy about my energy regulatory practice that I built for myself from the ground up, but I have a special soft spot for FERC appeals. Perhaps it's because the very first energy matter that I handled after leaving my former firm, Duncan & Allen was a FERC appeal at the D.C. Circuit just a few years out of law school. I still remember how intimidated I felt sitting by myself looking up at Justice Ginsburg (famous at the time for his nomination to the Supremes and subsequent withdrawal as a result of controversy over his past marijuana use) and awed by the marble grandeur of the courtroom.

Of course, there are plenty of other reasons that I'm fond of appeals. Appellate work is intellectually stimulating, and FERC appeals pose the added and unique challenge of simplifying complex concepts and jargon for the court. Plus there's the added reward of setting precedent and achieving a little bit of immortality in the process.

Appellate work is also predictable. As such, it was lifesaver for my practice when my now teenage daughters were babies, because I could research and write at night after they went to bed and arrange for childcare on the dates of argument.

Most of all though, appeals appeal to me because they revive my often dormant sense of optimism. Every time I step up to the podium, no matter how weak my case, I'm convinced that it's winnable and that I can persuade the judges' or change their mind through the power of my arguments and sheer force of will. For those brief moments at the podium,

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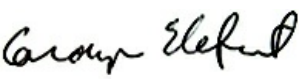
To celebrate my love of appeals, I've dedicated the entire June newsletter to an update on the Order No. 1000 road to appeal. With the issuance of FERC's Order on Rehearing of Order No. 1000 on May 17, 2012, the 60-day statutory clock for filing judicial review is now running. A handful of parties have already filed petitions for review, and presumably others will follow over the next month. In this newsletter, I'll share my predictions about the appeal and discuss the pros and cons of the D.C. Circuit or Seventh Circuit (the two circuits currently in contention to handle the appeal) as a forum. I've also pondered the implications of the mysterious disappearing dissent by Commissioner Moeller and explained why FERC appeals may not - or should not - cost as much as you might expect. This is a jam-packed newsletter, ideal for both appellate aficionados and those who simply want to understand more of how the appellate process works. So download this newsletter to your ipad or Kindle or print it out and settle in for a long read. Of course, if you have any questions about any of the materials in the newsletter or about my law firm and how we might serve you, feel free to contact me at 202-297-6100 or at carolyn@carolynelefant.com

Until next time,



Appellate Alert: FERC's Order No. 1000 Heads to Court and My Predictions

On May 17, 2012, FERC issued an order on Rehearing on Order No. 1000, the landmark rule on transmission planning and cost allocation. You can read my summary of the rehearing decision here. Now, the order heads to court.

With more than sixty petitions for review filed, many challenging not only discrete components of the Final Rule, but the Commission's authority to issue it at all, it's unlikely that the appeals will go away on their own through voluntary dismissal. But what's the likely outcome?
Here are some of my brief and very preliminary predictions about some of the issues:

1. The court upholds Commission's authority to require utilities to engage in transmission planning and cost allocation. The Commission's statutory authority over interstate transmission is broad. So even though some aspects of the proposed rule may trickle down to impact state planning and siting processes, because the effects on states are incidental the Commission's lawful exercise of its broad power over transmission, the state-encroachment arguments won't win the day.

2. Likewise, because Order No. 1000 is a rule and not an adjudicatory proceeding, the Commission is justified in relying on generic rather than specific factual findings so long as they are reasonable. Overall, the Commission's generic findings support the overall rule - although not necessarily specific features (e.g., state public policy requirement or elimination of ROFR)

3. With regard to claims that Section 202(a) of the

FPA bars the Commission from anything other than voluntary planning and transmission, I don't think that those will fly. Section 202(a) addresses interconnection and coordination, not planning and cost allocation which is what the Commission is mandating.

4. The requirement to consider public policy in transmission planning will have a tough time on judicial review. There are so many types of public policy - some, like RPS, may necessitate additional transmission but some, like DG carve-outs or demand response militate against new transmission. It's hard to say that the lack of consideration of public policy in transmission planning results in unjust and unreasonable rates (in fact, taking policy into account may be more likely to cause unjust rates because states focusing on indigenous energy development may be forced to pay for transmission in adjacent states that prefer to import renewables from a long distance to meet RPS requirements). Because the impact of public policy on jurisdictional rates and practices is uncertain and unproven, I'm guessing that it won't survive.

5. For similar reason, I think that the ROFR issue fails as well. Again, not much evidence in this record that federal ROFRs result in unjust and unreasonable rates, plus elimination of ROFRs can degrade reliability which in itself adversely impacts rates (unreliable service means that consumers get less for what they pay which is tantamount to paying more). Plus, there's the whole matte of Commissioner Moeller's disappearing dissent discussed below.

6. Some petitioners argued that elimination of ROFR violates Mobile-Sierra, to which the Commission responded that it would address these arguments on a case-by-case basis in the compliance phase. Thus, there's a possibility that the court might find that the Mobile-Sierra objections are not yet ripe for review. Of course, if the court resolves the ROFR issue based on lack of reasoned decision making, it doesn't really need to reach the Mobile-Sierra issues at all. In short, I can't make a call on this one, except to predict that petitioners should expect the Commission to ask for dismissal of Mobile-Sierra objections on ripeness grounds.

7. Some commenters argued that the Commission's decision not to allocate costs outside a region without a voluntary agreement violates cost causation principles. After all, if there are beneficiaries outside a region, cost causation principles require that they share in the costs. This line of argument essentially posits that the Commission didn't go far enough - and while it's a reasonable position, generally speaking, courts are less likely to overrule an agency when it fails to exercise the full scope of its authority (that was the result in the Order No. 888 decision where the court found that notwithstanding that the Commission *could* have regulated both bundled and unbundled retail transactions, its decision to refrain from regulating bundled retail transactions was reasonable). So I'm inclined to think that the Commission's decision to draw the line at inter-regional cost allocation has a reasonable chance of being sustained.

OK, so those are my predictions. What do you think? Feel free to email me at carolyn@carolynelefant.com with comments or better yet with your own predictions - and if you explicitly

consent, I'll publish them in next month's newsletter.

Judicial Review of Order No. 1000: D.C. Circuit or Seventh Circuit?

After Order No. 1000 issued, my first thought was "Which circuit is going to hear it?" Under Section 313 of the Federal Power Act, a petition for review of Order No. 1000 may be filed in the D.C. Circuit or in any of the other federal circuits where the licensee or utility impacted by the order is located. Since Order No. 1000 applies to over 160 utilities, any circuit could have been a contender to review the Commission's landmark rule. And initially, it appeared that there might be some split, with the Sacramento Public Utility District (SMUD) filing the first petition for review of Order No. 1000 in the Seventh Circuit, followed by three other petitions (as of the date of this newsletter) -- by Coalition for Fair Transmission Policy (CFTP), PSEG and South Carolina Public Service Authority were all docketed in the D.C. Circuit.

Now, the suspense is over - with the D.C. Circuit chosen as the court where Order No. 1000 petitions for review will be consolidated. Here's how the petitions wound up in the D.C. Circuit, as well as some thoughts on whether the D.C. Circuit is a better choice than the Seventh Circuit.

By way of background, after SMUD filed a petition for review in the Seventh Circuit, the Commission filed an unopposed motion at to transfer SMUD's petition for review to the D.C. Circuit for the convenience of the parties. But notwithstanding that the Commission's motion was uncontested, rules are rules, asserted Judge Easterbrook in this rather prickly denial of the Commission's request. Because the multi-district jurisdiction statute, 28 U.S.C. sec. 2112 kicks in when appeals are filed in competing circuits within ten days of a final order, the ability to transfer the case is out of the Seventh Circuit's hands, according to Judge Easterbrook. By statute, the Judicial Panel must select the appropriate forum by lot, at which point the circuit chosen may entertain transfer requests for reasons of convenience.

Events followed as Judge Easterbrook described. The Commission filed Notice of the Multi-circuit petition with the Judicial Panel on Multidistrict Litigation. And on June 13, 2012, the Multidistrict litigation panel randomly chose the D.C. Circuit for consolidation of the petitions.

But is the D.C. Circuit the right place from the perspective of petitioners?

On the surface, the Seventh Circuit seemed like a strong bet for petitioners, given its 2009 decision in Illinois Commerce Commission v. FERC. There, the Seventh Circuit vacated and remanded the Commission's approval of a region-wide (or "postage stamp") cost allocation mechanism for new high-voltage transmission projects in the PJM region because the Commission failed to offer "even the roughest of ballpark estimates" of the benefits that contributing ratepayers would receive from the project (the Commission has since essentially reaffirmed its position in the Order on Remand issued March 30, 2012, with Commissioner La Fleur dissenting). Meanwhile, in Order No. 1000, the Commission couldn't resist highlighting that its

requirement that any cost allocation methodology developed under the rule must reflect principles of cost causation complies with the Seventh Circuit's *ICC* decision. Therefore, it's only natural that challengers would want to go to the Seventh Circuit, for a ruling on whether Order No. 1000's cost allocation principles are indeed consistent with the *ICC* precedent.

Still, with the exception of the cost allocation issue in the *ICC* ruling, there really isn't any compelling reason for petitioners to seek review at the Seventh Circuit. Order No. 1000 is rooted in the Federal Power Act and Order No. 888. dating back to Order No. 888 issued 20 years ago. While the Seventh Circuit has its energy experts (like Judge Cudahy), overall, that circuit simply isn't as up to speed on energy regulatory minutia as the D.C. Circuit, and had the case been heard in the Seventh Circuit, petitioners would have needed to devote more time - and more critically, more verbiage in the word-limit constrained brief, to educate the court rather than address the merits.

Further, while the Seventh Circuit did indeed vacate the Commission in the *ICC case*, the case centered around cost-allocation which in turn involves lots of economic analysis which is one of the Seventh Circuit's strengths. Because of its law and economics background, the Seventh Circuit could confidently take the Commission to task for a loosey-goosey cost causation analysis. But the Order No. 1000 appeal focuses on traditional administrative law issues of statutory construction and *Chevron* analysis, issues that the D.C. Circuit has more experience resolving than any other. And the D.C. Circuit has not hesitated to vacate not just case-specific rulings (like the *ICC* case) but also rules. *See, e.g.* National Fuel v. FERC (vacating Commission gas pipeline affiliate codes of conduct).

So even though Order No. 1000 landed in the D.C. Circuit by random selection, sometimes fate gets things right.

The Mysteriously Disappearing Dissent of Commissioner Moeller and What It Means

Back in July 2011 when Order No. 1000 issued, Commissioner Moeller expressed substantial praise for the Final Rule, but nonetheless dissented in part, criticizing the Commission's decision to require elimination from open access tariffs (OATT) rights of first refusal (ROFR), *i.e.*, the priority held by incumbent transmission providers to own, construct and operate transmission within their local service territory. First, Commissioner Moeller expressed concern that reliability might suffer as a result of elimination of ROFR, since if a nonincumbent provider is chosen to build transmission and abandons the project, the Final Rule grants a blanket waiver of penalties from NERC reliability standards. By contrast, if FERC permitted incumbent providers to retain ROFR for their service territory, they would remain responsible for reliability and a broad waiver would not have been necessary. Second, Commissioner Moeller argued that to the extent that the Commission harbored concerns about the anti-

competitive impacts of ROFR, it could have adopted a more narrowly tailored remedy than eliminating ROFR entirely. In Commissioner Moeller's view, the Commission should have allowed incumbent utilities ninety days to decide whether to exercise the ROFR to construct a cost-effective and necessary transmission project, after which the non-incumbent utility would have an opportunity. In this way, incumbents could no longer endlessly block competitors from building needed transmission.

On rehearing, several commenters asked the Commission to adopt Commissioner Moeller's alternative approach to elimination of ROFR. (Download the bundled packet and search "Moeller" in the Rehearing PDF file). Yet, the Order on Rehearing doesn't mention the support for Commissioner Moeller's dissenting position. The rehearing order also summarily rejects the 90-day "use it or lose it" option for ROFR (Order at 327), asserting that even a limited exercise period would still discourage new transmission and result in unjust rates. But this time, Commissioner Moeller joined the majority while his previously dissenting view supporting a 90 day election (and expressing other concerns about the Commission's approach to ROFRs) disappeared without a trace of explanation.

In the past, Commission orders have been most vulnerable on judicial review when there's a strong dissent. In National Fuel, where the D.C. Circuit vacated FERC's affiliate code of conduct for pipelines, two Commissioners had strongly dissented, arguing that there was no evidence of abuse that would justify regulation of all affiliates. Likewise, the Commission also lost in Kamargo (oh, does anyone recall those scathing Commissioner Trabandt dissents? He was the FERC equivalent of Justice Scalia) and Piedmont Environmental Council (with Commissioner Kelly insisting that no, to witthold approval doesn't mean the same thing as reject), to name a few. And just two years ago, the DC Circuit remanded a case where the FERC majority failed to respond to reasonable concerns raised by dissenting then-Commissioner Wellinghoff.

As I discussed above, in my view, the Commission's treatment of the ROFR issue is already on weak footing, and I have no doubt that had Commissioner Moeller reaffirmed his dissent on rehearing, that would have clinched a reversal of the ROFR ruling (at least at the D.C. Circuit). Now that Moeller's dissent has disappeared, I'm not sure what happens since in all of the cases discussed above, the dissenting Commissioners reaffirmed, and even bolstered their opinions on rehearing (I haven't done much research, but offhand, I can't think of any cases where a previously dissenting Commissioner retreated from the original position without a shred of explanation). Certainly, Commissioners have the prerogative to change their views, but at the same time, reasoned decision-making requires some explanation -- particularly when several parties urged adoption of Commissioner Moeller's dissenting position on rehearing. Yet Commissioner Moeller's dissent isn't referenced or mentioned anywhere in the Commission's rehearing order.

Granted, the disappearing dissent is a bit of a sideline issue. But given the court's propensity for vacating Commission decisions where there's strong dissent, and the mysterious and wordless disappearance of the Moeller dissent from the record, I'd at least flag the issue on appeal if I were

challenging the ROFR ruling.

How Much Should An Appeal of A FERC Case Cost?

An unspoken rule of energy and appellate practice is that we don't compete on price. Let the consumer lawyers down in the trenches debauch themselves by hawking deeply-discounted services for misdemeanors, divorces and bankruptcies but here in the upper stratosphere of the legal food chain, there's no need for us to get our hands dirty. Our clients simply know that an appeal of a complex decisions cost them big bucks and they don't expect to pay less.

But why should appeals of FERC ruling cost so much? The answer is: they really shouldn't. Here's why.

For starters, once a FERC order reaches the appellate level, the universe of potential arguments is already narrowly circumscribed. The judicial review provisions of the Federal Power Act and the Natural Gas Act preclude parties from raising any objection not previously raised before the Commission, a jurisdictional requirement that courts strictly enforce. Thus, the appellate practitioner's role consists largely of identifying those issues worth pursuing on appeal, which is a far less time-consuming endeavor than researching and crafting new arguments.

Second, unless an appeal arises out of a FERC rehearing handled by a lay, pro-se litigant (a rarity in FERC practice, but that's been the case in at least one of my successful appeals), chances are that the issues preserved for appeal have been thoroughly researched and developed, often by multiple parties. And while appellate practitioners must devote some time to re-framing earlier arguments to comply with applicable appellate standards of review, again, finessing an argument doesn't involve as much time or effort as creating one from scratch.

Third, while it's true that appeals require familiarity with local rules of appellate practice not to mention strict compliance with frequently tricky or obscure procedural requirements, most serious FERC appellate practitioners stay on top of of these procedural trivialities without breaking a sweat (after all, only around thirty FERC appeals decided each year). As an added bonus, the FERC Solicitors' Office makes all of its briefs dating back to 2004 available online, which can serve as models for formatting briefs as well as an additional source of research. Collectively, extensive appellate experience and available FERC resources can streamline brief production considerably. As for preparation of the joint appendix, once a time-consuming, several-day process, out-of-the-box technology (like Adobe Pro) enable petitioners to compile and bate-stamp necessary portions of the record in a matter of hours (I've been compiling the record in FERC Order No. 1000 since the Final Rule issued in July 2011; you can download it here).

In light of these factors, it's feasible for some firms (like mine) to economically handle a FERC appeal for a flat fee starting at $15,000 and topping out at around $30,000 depending upon the number of

issues to be briefed, the extent of coordination with other parties and number of rounds of edits and review (note: fees do not include the cost of reproducing the briefs and Joint Appendix). And while appeals demand top quality lawyers, cheaper price doesn't mean cheaper quality either. I was named a Washington D.C. Superlawyer for 2012 and I've won a couple of significant victories at the D.C. Circuit, most notably vacating two six figure civil penalties in Clifton Power and Bluestone Energy .

There are many valid reasons to forego judicial review of a FERC decision: the chances of winning hover around 25 to 30 percent , a loss can result in harmful precedent and an appeal can prolong an already lengthy proceeding. But don't give up on a promising claim based on an assumption that a FERC appeal is out of your price range -- because it may cost much less than you thought.

We've Moved!

After five years at its existing location, the Law Offices of Carolyn Elefant has moved to a new home. The firm has departed the K Street corridor for a spanking new building in Foggy Bottom at 2200 Pennsylvania Avenue NW, Fourth Floor East, Washington D.C. 20037. The new location is better adapted to serve the needs of the firm's clients, most of whom are located outside the District but who often require a temporary work space when they come to town. On a personal note, the new office is just a straight, eight-block shot down K Street from where the Capital Crescent Trail feeds into Georgetown, which makes for an easy just-under ten-mile commute by bike from my home in Bethesda (which is a mile off the trail on the other end). In the past two weeks, I've biked to work four times and hope to increase the frequency once my travel schedule lets up.

The firm's phone number (202-297-6100) and my email (carolyn@carolynelefant.com) remain the same. But the firm's name will soon change as I roll out a re-branding effort that will take place over the course of the summer and early time. It's an exciting time for me professionally and the re-branding initiative is intended to reflect the firm's reputation in the legal community, the expansion of services that we are able offer to clients and most of all, the value, commitment and sheer doggedness that I strive to bring to all of my clients in handling their matters of first impression and last resort.